Supreme Court, U.S.
FILED
OCT 21 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-452

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

TENNECO OIL COMPANY,
Petitioner,
v.
KERN OIL & REFINING COMPANY,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER [1]

Kern's Brief in Opposition amply confirms the need for review by this Court. On the jurisdictional issue, Kern seeks refuge in exceptions to the general rule of divestiture, exceptions that even the court below did not embrace and that clearly do not apply. On the disclosure issue, Kern does not deny that "there may well be conflict among the circuits," Opp. 22, arguing only that the issue was not adequately presented below—a contention clearly refuted by Kern's own appendices. Opp. App. 1a-12a.

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[1] The statement required by S. Ct. Rule 28.1 appears at Pet. ii & App. M.

The District Court Lacked Jurisdiction To Enter Its Findings And Conclusions After The Notice Of Appeal

1. There is no dispute that the District Court entered its findings and conclusions on November 24, 1986, three days *after* Tenneco filed its notice of appeal. Pet. App. 53a, 81a. Kern argues that this clear error should be disregarded because Tenneco had filed a lengthy opposition to the court's *proposed* findings, and the court had signed those findings (with only slight changes) on October 10. Opp. 2. The whole point, however, is that neither Tenneco nor Kern ever knew of the October 10 signing, or the fate of Tenneco's point-by-point opposition, *until the signed findings were entered on the record on November 24*. By then it was too late for Tenneco to file motions under Rules 52(b) and 59(a) to amend or make new findings, because judgment had been entered on November 5 and such motions must be made within ten days of judgment.

Kern contends that the District Court *must* have intended to file the findings with the judgment, that the failure to do so *must* have been a clerical error, and that the same findings *surely* would be reentered in any event if the case were sent back. Opp. 2, 13, 19. Judgments of more than $30 million cannot rest on such speculation, and the rules governing the allocation of jurisdiction between the district and appellate courts—which were not followed here—are designed to ensure that they do not.

2. Kern recognizes the general rule that a notice of appeal divests a District Court of jurisdiction, Opp. 14, but argues that an exception applies here, that the District Court could enter its findings after notice of appeal because it was simply correcting a "clerical error" under Rule 60(a). Kern did not file a Rule 60(a) motion in the District Court, the Court of Appeals did not rely on this exception, and it does not apply. A "clerical error" under Rule 60(a) is an error of transcription or copying,

such as typing "24" when "4" was intended. Nothing of the sort occurred here. The record properly reflects what actually happened: the findings were entered November 24, three days after notice of appeal. Pet. App. 81a.

Rule 60(a) can be used to conform the record to reflect what everyone knew to be the case at the time, but the key point here is that everyone did *not* know that the findings were signed on October 10 until November 24—as the record accurately reflects—and it is this lack of notice that directly affected Tenneco's rights. As one court has noted, "It is settled that [Rule 60(a)] applies only to an error of transcription, copying, or calculation, and not to a fundamental *failure of discovery or notification.*" *Bershad* v. *McDonough*, 469 F.2d 1333, 1336 (7th Cir. 1972) (emphasis added). Neither Tenneco nor anyone else was notified of the judge's action on October 10, and the record should not be retroactively "corrected" to suggest that they did.[2]

3. Kern refers to another exception to the jurisdictional rule, permitting acts "in aid of the appeal." Opp. 16. Again, the court below did not rely on any such exception, and it does not apply. Acts "in aid of the appeal" include efforts to maintain the status quo *pendente lite*, not to explain retroactively a decision after an appeal has been taken. The authorities on which Kern relies, Opp. 18, are telling. For example, *Silverthorne* v. *Laird*, 460 F.2d 1175 (5th Cir. 1972), is the case Judge Posner cited in *Matter of Jones*, 768 F.2d 923, 931 (7th Cir. 1985) (concurring), to show the conflict on the

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[2] *Pattiz* v. *Schwartz*, 386 F.2d 300 (8th Cir. 1968), on which Kern so heavily relies, Opp. 15, is readily distinguishable on this ground. That case involved a judge's failure to enter a pleading submitted in connection with settlement *by both parties themselves*, so they clearly had notice of it, and "[n]o prejudice could possibly result from what the court did." *Id.* at 303. Here the failure to file and enter the findings meant the parties did not and could not know that they had been signed, which clearly prejudiced Tenneco.

question presented. *See* Pet. 13. And the very court that issued *Under Sea Industries, Inc.* v. *Dacor Corp.*, 833 F.2d 1551 (Fed. Cir. 1987), has since recognized the inevitable problems with its approach—the approach followed here. *See Hybritech Inc.* v. *Abbott Laboratories*, 849 F.2d 1446, 1450-51 (Fed. Cir. 1988); Pet. 13 n.9. These and the conflicting cases cited in the Petition amply refute Kern's assertion that the jurisdictional issue does not arise with any frequency.

4. Kern's point, in essence, is that the District Court's post-appeal entry of findings was harmless error. As noted in the Petition, this Court recently held that such an analysis "misunderstands the nature of a jurisdictional requirement." *Torres* v. *Oakland Scavenger Co.*, 108 S. Ct. 2405, 2409 n.3 (1988). *Torres* involved a clerical error in a notice of appeal, and yet the Court insisted on strict adherence to the jurisdictional rules. It should do the same here, where much more than a "clerical" error is at stake, and where the court's error directly affected Tenneco's substantial rights.

Kern Does Not Dispute The Circuit Conflict On The Disclosure Issue, And Tenneco Properly Raised That Issue Before The District Court And The Court Of Appeals

1. Despite Kern's effort to avoid the merits of the undenied and undeniable conflict among the Circuits on the disclosure issue, the record is clear that Tenneco properly raised and preserved the issue before both the trial and appellate courts. The extensive litigation and briefing of the issue prior to trial, *see* Ct. App. Excerpts of Record 603, 607, 647, 679, 715, 746, 766, 821, 911, 955, was addressed to the existence of "good cause" under Rule 26(c)—as this Court in *Seattle Times* instructed it should be. *Seattle Times Co.* v. *Rhinehart*, 467 U.S. 20, 37 (1984) (where "a protective order is entered on a showing of good cause as required by Rule 26(c), * * * it does not offend the First Amendment").

It was the denial of disclosure in the absence of good cause[3] that gave rise to a First Amendment violation, and the First Amendment issue was argued as such before the District Court, *see* Ct. App. Excerpts of Record 963, 1002, 1024, 1077, and—as Kern's own appendices show—before the Court of Appeals.[4]

2. Kern also contends that resolution of the disclosure issue will not affect the outcome of this case—that "[t]here is no reason to believe that the district court's factual findings on this question would be changed by the existence of the allegations in ERA's administrative complaint, the same allegations Tenneco made at trial." Opp. 25. This speculation is patently unfounded. There is *every* reason to believe that the court, which based its decision on a conclusion that Kern was "in compliance" with the DOE entitlements program, Pet. App. 43a, would have had a different view if it knew that DOE itself thought Kern "unlawfully evaded its obligations under the Entitlements Program." Ct. App. Excerpts of Record 3777. It was the court's order on disclosure that prevented Tenneco from obtaining and providing the agency's view to the court, and thus directly affected the outcome of the case.

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[3] There can be no serious dispute that this is what occurred; the District Court denied disclosure despite expressly finding that Kern had failed to establish good cause under the Rule. Pet. App. 29a, 48a.

[4] Kern's appendices show that Tenneco cited the First Amendment no fewer than *eight times* before the Ninth Circuit. *See* Opp. App. 2a, 3a (twice), 4a, 7a (twice), 9a, 9a n.11 (cross-reference to extensive briefing before District Court). Kern seems to take issue with the *extent* of Tenneco's briefing, not whether the issue was properly raised and preserved for purposes of Supreme Court review. Kern also criticizes Tenneco for not specifically objecting to the trial judge's closing the courtroom, but as the judge himself ruled, the closure was simply the continuation of the pre-trial order barring disclosure, *see* Pet. 5, to which Tenneco had vociferously objected. *See* Ct. App. Excerpts of Record 603, 607, 679, 746, 821, 955.

3. Kern also seeks to downplay the significance of DOE's Proposed Remedial Order ("PRO"), and Kern's own inconsistent positions. Kern argues that DOE did not accuse it of fraud, Opp. 3, but Kern's reference is to the exception relief issue—not the question of its evasion (DOE's word—not ours) of its obligations under the entitlements program. On that issue, the PRO speaks for itself: Kern reported transactions that "never really took place" and which "were designed, in fact, 'for the purpose of camouflaging the real deal' from the DOE." Ct. App. Excerpts of Record 3771.

Kern condemns Tenneco as "outrageous" for reporting that Kern is now arguing before DOE that it would not have refined additional price-controlled Tenneco oil, and that this was the opposite of what it told the District Court. Opp. 25.[5] Kern's own brief refutes its contention. Kern admits it is arguing before DOE that it would have sold and not refined certain price-controlled oil, *specifically including Yowlumne oil.* Opp. 12 & n.11. Before the District Court, Kern argued and the District Court held that "[h]ad the Yowlumne crude been made available to Kern, * * * it would have been processed by Kern and not sold." Pet. App. 17a. The Ninth Circuit itself recognized that "Kern is now arguing a different theory to a different tribunal * * *." *Id.*[6]

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[5] Kern's brief in opposition is replete with *ad hominem* attacks on petitioner as untruthful, deceptive, and outrageous, even going so far as to suggest that Tenneco is not "a good citizen." Opp. 24. Whether such a tactic will succeed remains to be seen, but at least the Court can rest assured that, if this case is argued, it "will have the benefit of adversary presentation." *Bender* v. *Williamsport Area School Dist.*, 106 S. Ct. 1326, 1331 (1986).

[6] If the Court has any doubt about the seriousness of Kern's evasion of its obligations—and the direct effect of that evasion on Tenneco's rights in this litigation—it may wish to hold the Petition pending decision of the appeal before the Temporary Emergency Court of Appeals ("TECA"). As noted in the Petition, Pet. 7 n.3, the regulatory cause of action in this case was within the

4. On the merits of the disclosure issue, Kern does not dispute that there is a conflict. Opp. 22. It simply relies heavily on *GAF Corp.* v. *Eastman Kodak Co.*, 415 F. Supp. 129 (S.D.N.Y. 1976)—a case which itself noted the conflict, *see id.* at 130-131, and which has been specifically rejected by other courts. *See* Pet. 26 & n.23. Kern also states that the present case presents "no public interest or public policy question," Opp. 22, a plainly untenable contention. The Circuits have split sharply on the disclosure question at issue here, and the courts themselves have explicitly acknowledged the split. *See* Pet. 26 n.23, 27 n.24. Here, a court order—expressly *not* based on "good cause" under Rule 26(c)—prevented a party from even revealing to the appropriate government authorities concrete evidence—later found to be true—that the other party had defrauded a government program to the tune of $60 million. Ct. App. Excerpts of Record 3771, 3777, 3780. This Court may or may not agree with such a result, but there can be little question that a conflict in the Circuits permitting it raises a public policy question of the utmost significance which this Court should resolve.

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exclusive jurisdiction of TECA, and has been appealed to that court. TECA No. 9-99. Briefing is complete, and Tenneco has moved for expedited disposition, alerting TECA that its decision on the issue of Kern's violation of the entitlements program could assist this Court in considering the questions presented in the Petition.

CONCLUSION

For the foregoing reasons, and those in the Petition, this Court should grant the writ and reverse the decision of the court below.

Respectfully submitted,

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